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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 321

BRADLEY MINING CO., a corporation,

Petitioner,

vs.

EDWARD H. BOICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRADLEY MINING CO.,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the order of the Division of the United States Court of Appeals for the Ninth Circuit denying a rehearing and rehearing en banc entered in the above entitled case on June 24, 1953 (R 2328 ff.), and the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 5, 1951 (R 2225). The reasons for the presentation of this petition may be summed up in the language of one of the judges in the court below—"For as I see it, both the trial judge and the judges of this court, have simply refused to function." (R 2333)

OPINIONS BELOW

The opinion of the United States District Court for the District of Idaho, Southern Division, denying Motion for New Trial (R 116 ff.) is reported in 92 Federal Supp. 750. The first majority and dissenting opinions[1] of a panel of three Judges of the Court of Appeals (R 2204 ff.) is reported in 194 Federal 2d 80. The majority and dissenting opinions of the same judges denying petitioner's application to vacate the denial of its petition for rehearing and to reinstate the petition (R 2300 ff.) are reported in 198 F2d 790. The prior opinion of this Court in this case appears in 345 U.S. 932. The majority and dissenting opinions of the panel of three Judges of the Court of Appeals that originally decided the case, denying rehearing en banc after reversal and remand by this Court, (R 2328 ff.) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1951 (R 2225). A petition for rehearing and rehearing en banc, filed in time, was denied on January 23, 1952 (R 2226). An application to vacate this denial and reinstate the petition was entertained and denied August 27, 1952 (R 2299). On April 13, 1953, this Court, on rehearing, granted a writ of certiorari, vacated the order of the Court of Appeals denying petition for rehearing en banc, and remanded the case to the Court of Appeals for further proceedings in the light of *Western Pacific Railroad Corporation v. Western Pacific Railway Company,* October Term 1952, Nos. 150 and 160, 345 U.S. 247.

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1. For the convenience of this court the three opinions of the court below are set forth in appendices A, B and C attached hereto.

On May 12, 1953, and after the decision by this Court of the Western Pacific Case and this case, appellant filed with the Court of Appeals a supplemental petition for rehearing and memorandum of Appellant's suggested reasons for rehearing en banc (R 2311 ff.). As a result of the decision by this Court in the Western Pacific Case the Court of Appeals on May 27, 1953, adopted its amended Rule 23 governing procedure with respect to rehearings en banc.

This rule, as amended, so far as pertinent here, provides:

> "All petitions for rehearing shall be addressed to and determined by the court as constituted in the original hearing.
>
> "Should a majority of the court as so constituted **grant a rehearing**[2] and either from a suggestion of a party or upon its own motion be of the opinion that the case should be heard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc."

On June 24, 1953, the Division of the Court of Appeals, as constituted in the original hearing, one judge vigorously dissenting, denied Petitioner's petition for rehearing en banc or otherwise (R 2328 ff.). Opinion not yet reported (App. C).

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Sections 1254(1) and 2101(c). It is sustained by the *Western Pacific Case,* above, this Court's decision in this case, and the *Johnson and Moquin Cases,* below.

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2. All emphasis by use of bold face type is ours.

QUESTIONS PRESENTED

(1) Whether the trial court's ~~falure~~ failure to exercise its constitutional powers and perform its duty to pass judgment by giving relief on motion for new trial should be corrected because the trial court misconceived its function?

(2) Whether the decision of the Court of Appeals in this case, which, in actual and practical effect enunciates a rule of trial practice for other litigants in other situations and permits the use of grossly unfair and prejudicial tactics for the purpose of inducing passion and prejudice into the case without penalty shall be permitted to stand?

(3) Whether, in the trial of a case in a United States Court, counsel may, with impunity, indulge throughout the trial in a planned and consistent scheme of appeals to passion and prejudice of the jury?

(4) Whether, when such a departure from the accepted and usual course of judicial proceedings has resulted in a grossly excessive verdict, that verdict can be permitted to stand?

(5) Whether the decisions of this Court in *N.Y.C. Ry. Co. v. Johnson,* 279 U.S. 310, 73 L. ed. 706, and *Moquin v. Minneapolis, etc. Ry. Co.,* 283 U.S. 520, 75 L. Ed. 1243 are to be emasculated and brushed aside by assuming the jurors were not misled by constant appeals to passion and prejudice through the introduction of inflammatory matter under the guise of unsupported 'impeachment' cross-examination upon the assumption that jurors have intelligence enough to know (a) that if a party has evidence to impeach a witness he will produce it and (b) that statements, in the form of impeaching questions, in support of which no evidence was produced, were to be disregarded—when a grossly ex-

cessive verdict demonstrates that the assumption is wholly unwarranted?

(6) Whether the rule adopted by the Court of Appeals for the disposition of petitions or suggestions for rehearings en banc and the summary denial of appellant's petition for a rehearing en banc by two members of the Division which originally heard the case complied with the pronouncements by this Court in the *Western Pacific Case*?

(7) Whether the rule adopted by the Court of Appeals of the Ninth Circuit for the disposition of petitions for rehearings en banc being in conflict with the practice of the Court of Appeals for the District of Columbia and the United States Court of Appeals for the Third Circuit creates a situation which calls for the exercise of this Court's power of supervision? (14 F.R.D., Advance Sheets 91).

STATEMENT

In the original petition for certiorari which, on rehearing, was granted without limitation, the nature of the case was stated. For convenience and completeness here we repeat that statement.

Respondent brought this action against Bradley Mining Co. and John Bradley, its Executive Vice-President, for $50,000 for damages for false imprisonment and $100,000 damages for slander (R 3-13). No special damages were alleged or proved. The cause was concluded in favor of the individual defendant (R 2187) and by a verdict against the corporate defendant, the petitioner here, for $60,000 (R 109). Motion for new trial was denied (R 116 ff.). The appeal to the Court of Appeals for the Ninth Circuit was submitted to a panel of three—Judges Healy, Bone and

Pope. The judgment was affirmed by two judges—Judge Pope dissenting (R 2204 ff.; Appendix A hereto). A petition for rehearing and a hearing en banc before the seven judge court was filed and denied by the same two judges who had affirmed the judgment (R 2226). The dissenting judge's characterization of the whole case was:

> "In my opinion a very thin case has here been whipped into a monstrosity".

The dissent was on the ground that the verdict was excessive and was the result of appeals to passion and prejudice, which that opinion states and documents in detail. The most that the majority could say of this conduct of counsel was:

> "One need not approve tactics of this sort in order to reject appellant's argument."

These opinions are set forth in 194 F.2d 80 (App. A).

To understand the point of the foregoing a summary statement of matters which occurred over a period of more than nine months and which were made to appear at a five-week trial is necessary.

Stibnite is a small mining town in a remote region of the mountains of Idaho. The streets and alleys were public but the rest of the property was owned by Bradley Mining Co. and, with one or two exceptions, the inhabitants were employees of the company or members of the families of employees. The employees, in matters of common concern, dealt with the company through a formally constituted "Employees' Representative Committee" (R 374-384, 405, 406).

Agreeably to the Idaho statutes (Idaho Code 72-397 to 72-309) the company and the employees had entered into a

contractual plan for medical service, and a second plan covering wives and children of employees. In 1943 the company opened a hospital at Stibnite. All the company's employees and members of their families were members of the medical plans.

Respondent, a doctor licensed to practice in Texas, and a stranger to Stibnite, began service March 1, 1947, as the doctor in charge of the Stibnite Hospital. At first he seemed to do well enough. But at the end of about three months marked laxity and inattention to duty began to manifest itself. The record is filled with general statements and specific instances in too much detail for summary here. Patients' complaints began in July. Eventually the matter was taken up by the Employees' Representative Committee. In November, it adopted a resolution, critical of the doctor. It and company officials conferred with the doctor. The situation was not cured. There were further conferences with the Employees' Representative Committee, unfulfilled promises to improve, and additional complaints. The situation got progressively worse. Respondent's conduct became erratic and bizarre. In January, petitioner took steps to find a new doctor.

Respondent's inattention to duty and complaints from patients and nurses continued. Because of respondent's conduct one registered nurse resigned on February 14, 1948. On March 31, 1948, due to respondent's behavior, the registered nurse who had been head nurse at the hospital since its inception resigned and the hospital was without a registered nurse for 22 days. Two new registered nurses came in. Still the hospital was not operated properly. The men at the mill began circulating a petition to have the

doctor removed. Respondent's employment was terminable on 60 days notice (Ex. No. 10, 11, R 225, 232) and finally, on April 30, 1948, petitioner was forced to give respondent 60 days notice of termination (Ex. No. 2, R 196).

Immediately thereafter, in the early part of May, respondent performed an operation on a Mrs. Bishop in which there was a shocking want of proper technique and care. *On May 13, the doctor performed an operation on a Mrs. Wood in which he removed a living fetus—which, by his own admission he later secreted in his apartment, placed in a pickled peach jar and buried in the ground.* His own testimony was that he did not know that the woman was pregnant. But see Judge Pope—"One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation." (App. A, p. 9).

On the morning after the Wood operation, the head nurse made a complete report to the company officials and also stated that respondent was contemplating a similar operation on another pregnant woman in the hospital. We make reference here to Judge Pope's judicial statement as to the sequence of events (App. A, p. 10):

> "The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.

It was following this report that the Company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at once. It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.

The charge of slander arises out of these remarks. At first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near other outside doors of the apartment to prevent the doctor from leaving the apartment at all. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite".

Judge Pope further states "The evidence of imprisonment was exceedingly flimsy". (App. A, p. 11)

As to the claimed slander, in addition to the above characterization of respondent's "mad surgery", four disinter-

ested graduate registered nurses gave detailed testimony regarding respondent's inexplicable and frequent erratic and eccentric conduct and demeanor. This testimony—corroborated by many other witnesses—was neither denied nor impeached in any manner.

In this connection Judge Pope found (App. A, p. 12):

> "But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, *there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.*
>
> I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking. . . .
>
> *I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous.*" (Emphasis ours).

There was not a word of testimony which would support any finding of damage in fact. The chief actor in the epi-

sode over the weekend of May 14-16, 1948, for petitioner, was its Executive Vice-President, Mr. Bradley. The jury returned no verdict as to him and by stipulation the case was disposed of in his favor.

The jury, however, returned a verdict of $60,000 against the petitioner corporation—Why? The obvious answer of jury prejudice against the company lies in the tactics of respondent's counsel.

During the whole course of the trial the attorneys for respondent, in cross-examination ostensibly for the purpose of impeachment, introduced matters derogatory of petitioner before the jury—for which there was no evidence—for which they never attempted to produce any evidence—thus introducing by "impeachment" highly inflammatory matters whose only purpose could have been to create jury prejudice.

See Judge Pope (App. A, p. 13, 14):

> "In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record."

This "isolated instance of trifling consequence" was the interjection of religious prejudice on cross-examination carrying the totally unsupported insinuation that the mine manager had, in a conference with respondent, rejected an applicant for head nurse on the ground that she was Jewish and a Jewish refugee (R 1602, 1603):

"Q. She was a **Jewish refugee,** was she not?

A. I don't know.

Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?

A. No, sir.

Q. You don't recall saying that—saying that inasmuch as she was **Jewish,** and a **Jewish refugee,** that she would not fit into the life at Stibnite and that you may as well forget her?

A. Nothing was said about being Jewish."

In a footnote, the majority stated (App. A, p. 3):

"In one instance, it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time".

But how effective is an objection to cross-examination which apparently is for *impeachment* purposes? See the following cross-examination of Mr. Zarybnisky (R 1418, 1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

"A. I don't remember.

Mr. Breshears: We object to this, there is no connection with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*
The Court: *You may ask for that purpose.*
Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*
A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Counsel's purpose was obviously without foundation, to get over the effect of the *question* to the jury.

It is conceivable that one or two instances of inadvertent improper and inflammatory conduct could be overlooked. But the record in this case contains more than 50 similar appeals to passion and prejudice under the guise of "impeachment". Record references to these are set forth in Appendix D attached hereto. Judge Pope's opinion cites 20 specific examples and his conclusion is (App. A, p. 15):

> "The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise

to passion and prejudice on the part of the jury. . . .

Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. . . .

The important fact is that this highly prejudicial matter was improperly before a jury which had produced a very large verdict. It serves to account for the size of the verdict. . . . It is all of the same stripe as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an exces-

> sive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one". Minneapolis etc. Ry. v. Moquin, 283 U.S. 520".

Judge Pope's finding of the existence of appeals to passion and prejudice is actually confirmed by the majority panel opinion—see App. A, p. 4):

> "The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury."

The short answer to the brushing off by the majority of these inflammatory jury appeals is that respondent's counsel did *not* produce evidence to support *any* of these numerous "impeachments".

Furthermore, we urge that every litigant is entitled to a fair and impartial trial; that verdicts of jurors should be rendered only on the issues made by the pleadings and the evidence, and that—where prejudicial and inflammatory matter is injected into a record and appeals made to passion and prejudice—it cannot be assumed that jurors are not misled thereby.

We also urge that such misconduct having *any* tendency to inflame the jury should not be approved—the test should be not that the prejudicial matter had a "*substantial* tendency to inflame", but that it had *any* tendency to do so.

With deference to the majority, we submit that it is difficult to conceive of any more flagrant or "substantially inflammatory" appeals to jury prejudice.

The trial judge, in passing on the motion for new trial, misconceived his functions,—assumed that it had no power or function to pass on the facts and assumed that its function was like that of an appellate court. (This is made clear by an earlier order reversed in *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (Circ. 9) decided after denial of the motion for new trial in the case at bar.)

REASONS FOR GRANTING THE WRIT

(1) A grossly excessive and monstrous verdict has been induced by passion and prejudice and the Court below has decided on important questions of federal law,—that courts of appeal should afford no relief where an excessive verdict in a federal court has resulted from improper appeals to passion and prejudice by members of the Bar of the federal court in the course of the trial of a case,—in a way which is in conflict with *Minneapolis etc. Ry. Co. v. Moquin,* 283 U. S. 520, and *N.Y.C.R. Co. v. Johnson,* 279 U.S. 310. (Rule 38, 5(b).)

(2) The trial judge plainly failed to exercise his Constitutional powers and perform his duty to pass judgment by denying relief to appellant on motion for new trial upon the grounds that he had no power to set aside the verdict of the jury for the reason that he believed it to be excessive

and thus correct an injustice done by the jury.[3] Such mistaken renunciation of power on the part of the trial judge clearly deprives the appellant of a substantial right and calls for the exercise by this Court of its power of supervision. (Rule 38, 5(b); *Thiel v. So. Pac. Co.*, 328 U.S. 217, 225.)

(3) The decision of the Court of Appeals in this case, in actual and practical effect enunciates a rule of trial practice for other litigants in other situations which permits the use of grossly unfair and prejudicial tactics for the purpose of inducing passion and prejudice into the case without penalty.

(4) The rule adopted by the Court of Appeals for the disposition of petitions for rehearing en banc and the summary denial of appellant's petition for a rehearing en banc by two members of the division which originally heard the case does not comply with the decision of this Court in the Western Pacific case.

(5) The rule adopted by the Court of Appeals for the Ninth Circuit for the disposition of petitions for rehearings en banc is in conflict with the practice of the Court of Appeals for the District Court of Columbia and the United States District Court of Appeals for the Third District and creates a situation which calls for the exercise of this Court's power of supervision. (14 F.R.D., Advance Sheets 91).

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3. "The question is whether a litigant in a federal court is entitled to have the judges, both trial and appellate, exercise their constitutional power, and perform their duty, to pass judgment. Although this is a case which got in the federal court by reason of diversity of citizenship, in my view it poses an important federal question relating to the function of a trial judge. . . . For as I see it, both the trial judge and the judges of this court, have simply refused to function." (App. C)

We have stated the reasons for granting of the writ in the order in which they arose in the course of this case. Enlarging on these suggestions we turn to the last of these suggestions first.

After reversal by this Court of the order denying the application for rehearing en banc, the Court of Appeals again denied the application and rejected the suggestion that the case be heard en banc purporting to act under the Court's amended Rule 23. The heart of this rule appears in the first sentence of the last paragraph:

> "Should a majority of the court as so constituted[4] **grant a rehearing** and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge."

If the Court so constituted **grants a rehearing** and is of the opinion that the matter should be reheard en banc and so informs the Chief Judge, he is then to convene the active judges of the Court, and the whole Court will then determine whether the case shall be reheard en banc. Under this rule it is the full Court which is to make the final determination. But it has no opportunity to make such determination unless the Court as originally constituted on the hearing draws the matter to the attention of the Chief Judge and that Court is not to draw the matter to the attention of the Chief Judge, for determination by the full Court, **unless the Court as originally constituted grants a rehearing, i.e., is itself willing to rehear the case even if the full Court does not think it should be reheard en banc.** The rule in terms conditions consideration of a hearing en banc on

4. That is as constituted on the original hearing. See p. 3 above.

the division's willingness itself to rehear the case. This rule does not comply with the decision in the *Western Pacific Case.* In that case the majority opinion after an analysis of the statute (28 USC § 46(c)) in the light of its history, concluded that it was nothing more than a grant of power to courts of appeal to hear causes en banc. Significantly, the opinion did not stop with this. It went on:

> "But even if the statute grants only power plus the discretion for its exercise, that does not mark the end of our review of the en banc phase of this case. The en banc power, confirmed by § 46(c), is, as we emphasized in the *Textile Mills Case,* a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate."

It was held that, appropriately, the exercise of the power might be delegated to a division of three judges. But the opinion makes it clear that these three judges in passing upon whether the case should be heard en banc are to perform a function entirely different from that which they would perform in determining whether they themselves, as a division only, would rehear the case. The opinion goes on:

> "And, recognizing the value of an efficient use of the en banc power, the Court should adopt such means as will enable its full membership to determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable."

Certainly, amended Rule 23 of the Court of Appeals for the Ninth Circuit does not even look in the direction of this requirement. To the contrary it seems to fly squarely in the

face of the statement of this court that while the power is to be used sparingly a court "may not take steps to curtail its use indiscriminately." But the real vice of Rule 23 is that it is squarely in conflict with the following holding in the *Western Pacific Case:*

> "Finally, it is essential to recognize that the question of whether a cause should be heard en banc **is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division.** The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court."

But under amended Rule 23 of the Court of Appeals of the Ninth Circuit the matter of hearing en banc cannot "be considered separate and apart from the question of whether there should be a rehearing by the division" **because no consideration is to be given to the question at all unless a majority of the Court as originally constituted "grant a rehearing."**

That this case was a proper one for independent consideration of rehearing en banc rests on something more than the assertion of counsel. The decision of the full Court of Appeals for the Ninth Circuit in *So. Pac. Co. v. Guthrie,* 186 F2d 926, as Judge Pope pointed out in his dissents, demonstrated a marked divergence of view among the judges of that court as to how the court should act in the face of grossly excessive verdicts. The "luck of the draw" put upon the division to which this case was assigned three of the four judges who would not act to give relief in the

Guthrie Case. Yet, in this case, Judge Pope, one of those four judges, was so impressed that the result here was outrageous that he dissented from affirmance of the judgment and it was he who pointed out that in the light of the views expressed by the judges in the *Guthrie Case* a rehearing en banc of the case in hand would produce a different result. (See App. B.) It is submitted that the procedure adopted by the Court of Appeals in this case is inappropriate as explicitly calculated to deprive the judges who dissented in the *Guthrie Case* of the opportunity of even knowing of the question pending in this case. (And compare the opinion of Mr. Justice Frankfurter in the *Western Pacific Case.*)

But there is more to this case than there was to the *Guthrie Case.* That was a case of mere excessiveness. This is a case of excessiveness induced by a planned course of appeal to passion and prejudice which the decision below would permit to stand in the face of the *Johnson* and *Moquin Cases,* above. Judge Pope's opinions find and document this course of conduct. The majority below, far from denying this, concede the impropriety of counsels' conduct. It is passed off with the bland assumption that although designed to affect the jury the design failed, and this in the face of an outrageous verdict in a case where, concededly, there was no proof or even claim of special damage.

One of the grounds invoked to sustain the result is that the trial "judge, familiar with the atmosphere of the trial and sensible to imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive." But in placing its reliance here the majority was really resting upon and giving approval to the trial judge's misconception of his own functions.

The trial court, after referring to constitutional provisions for trial by a jury said:

> "If this mandate is to be obeyed the court must proceed with caution when a motion such as is now before this court is considered, with the thought in mind that if the court is going to set aside the verdict for no reason except that the court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the court could supplant its opinion in place of the opinion of the jury."

Judge Pope, in his dissent from the decision of June 24, 1953, denying rehearing after remand by this Court, correctly appraised the action of the trial court as being not an exercise by it of a discretion vested in it but as a ruling that there was no such discretion and, by consequence, the court's action was a failure to perform the court's constitutional duty. Judge Pope, after quoting the language of the trial court quoted just above, appraised the situation as follows (App. C):

> "Most assuredly this is not the law. Murphy v. United States District Court, 9 cir., 145 F. 2d 1018, 1020; Charles v. Norfolk & Western Ry. Co., 7 cir., 188 F. 2d 691, 695; Felton v. Spiro, 6 cir., 78 F. 576, 581. And the trial court, proceeding upon this mistaken premise, after discussing the size of the verdict, concluded that 'the amount of damages allowed was the jury's best judgment,' (92 F. Supp. at p. 756)."
>
> "That the appellant was entitled to more than that, and that such mistaken renunciation of power by the trial judge is reversible error, was decided in Felton v. Spiro, supra, by a court of which Judges Taft and Lurton were members, in which it was said: 'But the motion for new trial is a remedy accorded to a party

litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the more important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error.' (78 F. 581.)

"For this reason alone the case should have been reversed and remanded."

This aspect of the case presents a problem which though garbed as a matter of procedure is a vital matter of substance. No verdict would be permitted to stand against a party if he were deprived of the right to be represented at the trial by counsel. That right involves the right to be properly and adequately represented. A party is not so represented if his opponent is permitted to obtain a verdict by methods which have been condemned repeatedly.

And a party, whose case is tried by a jury, is deprived of his full rights to a trial where the trial court, misconceiving its function, does not, on motion for new trial, exercise its own independent judgment upon the case as matter of fact. This is its function and duty, and its function and duty is unlike that of an appellate court. (*Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251; *Capital Traction Co. v. Hoff,* 174 U.S. 1; *Pleasants v. Fant,* 22 Wall. 116; *Aetna Casualty & Surety Co. v. Yeatts,* 122 F. 2d 350

(Circ. 4); *General etc. Ins. Co. v. Central Nat. Bk.*, 136 F. 2d 821, 823 (Circ. 6); *Reid v. Maryland Casualty Co.*, 63 F. 2d 10, 12 (Circ. 5). Where the trial court fails to perform its function it is guilty of an error of law which should be corrected on appeal. (*Felton v. Spiro*, 78 Fed. 567, 581 (Circ. 6—opinion by Taft, Lurton concurring, both later members of this Court); *General etc. Ins. Co. v. Central Nat. Bk.*, above; *Virginian Ry. Co. v. Armentrout*, 166 F. 2d 400, 408 (Circ. 4).)

CONCLUSION

The adoption of Amended Rule 23 in the Ninth Circuit obviously affects cases generally in that Court, establishes the practice for them and its correctness is a matter of importance far beyond the decision of this case. The Rule and its application in this case are in conflict with this Court's decision in the *Western Pacific Case.*

Countenancing a grossly excessive verdict obtained by a deliberate course of appeals to the passions and prejudices of the jury is likewise a matter which goes to the essence of methods of administration of justice in the Federal Courts. If the conceded misconduct here is to be condoned upon the ground that the jury, being sensible, was not influenced all point is taken from the decisions of this Court in the *Johnson* and *Moquin Cases.* The assertion is one which, with deference, no lawyer of real experience in the trial of jury cases would make.

Finally, apparently it is necessary for this Court again, in the exercise of its duty of supervising the administration of justice in the Federal Court, to announce the rule that the function of a trial judge, in a case tried with a jury, does not end with determining that there is evidence sufficient to warrant submission of the case to the jury but, upon

the return of the verdict, it is necessary for him to reappraise the case, give it his independent judgment and set aside the verdict whenever, in his own mind, an injustice has been done. This Court should again remind trial courts that they may not rest their denial of motions for new trial, as the trial court did in this case, upon the proposition "that the amount of damages allowed was the jury's best judgment." That it did this appears from the sentence immediately following where the trial court said: "This being true, the Court is of the opinion that it would not be justified in interfering with the jury's determination, and an order is filed in harmony with this opinion." It is submitted that the function of the trial court, on motion for new trial, is not to determine that the verdict is "the jury's best judgment" but its duty is to set the verdict aside unless in the Court's own mind the verdict is a **just** judgment, uninfluenced by improper considerations.

Dated: September 3, 1953.

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(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

BRADLEY MINING COMPANY, a Corporation,
Appellant,

vs.

EDWARD H. BOICE,
Appellee.

No. 12,684
Dec. 5, 1951

Appeal from the United States District Court, for the District of Idaho, Southern Division

BEFORE: HEALY, BONE, and POPE, Circuit Judges

HEALY, Circuit Judge

This appeal is from a judgment against appellant in the amount of $60,000 in a suit claiming damages for slander and false imprisonment.

Much of appellant's argument here has been given over to factual contentions. The district judge in an opinion denying a motion for a new trial outlined the testimony supporting the verdict, 92 F. Supp. 750, and there is no occasion for our going over the same ground. All that need be said is that the evidence was such as to make the question of liability one for the determination of the jury. But appellant argues that in the form returned the verdict must be taken as a finding against appellee on all essential facts. Before turning to other points we will notice this claim.

In addition to the corporate appellant, its executive vice president, John Bradley, was made a defendant in the case. Bradley was personally in charge of all the Company activities giving rise to this suit. The verdict returned was against the Bradley Mining Company alone. It made no mention of John Bradley, either one way or the other. In this posture of affairs the court inquired of counsel whether they desired the jury to be returned to their room to clear up their verdict as regards Bradley. Both sides replied in the negative.

Counsel's point here is that the case was decided by the jury in favor of the defendant Bradley, hence all questions of fact which were touched by his activities have been determined against appellee. No Idaho authority is cited in support of the argument, nor are there any citations of analogous decisions from other jurisdictions. Appellee calls attention to the California case of Lloyd v. Boulevard Express reported in 249 P. 837. The situation there was in principle on all fours with the present. The corporate defendant was held liable by the jury but no verdict was returned against its active and responsible agent, Mitchell, who was also a defendant. The court remarked [p. 838] that "the jury did not find either for or against Mitchell. It is the settled law in this state that the verdict of a jury against one of two defendants is not a verdict in favor of the other defendant. Such a verdict indicates simply that the jury failed to find upon the issues." The court added that since the corporate defendant noticed the omission and did not ask that the jury be required to find on the issue, it could not now be heard to complain. The California rule would probably be followed in Idaho.

Appellant's principal argument aside from an appeal to the evidence appears to be that the verdict was excessive and was arrived at as the result of passion and prejudice. There was enough evidence, certainly, if believed, to warrant the imposition of general damages in more than a nominal sum, both on the issue of false imprisonment and on the slander issue. Appellee produced testimony that armed guards were for a number of hours placed about his apartment with the view of circumscribing his movements. Consult in this connection Griffin v. Clark, 55 Idaho 364. Charges of insanity and of the performance by appellee of an illegal abortion—charges obviously slanderous per se—were testified to have been made in the presence of members of the general public under circumstances which the jury might properly have found rendered them unprivileged. Too, the jury might fairly have inferred from the record that appellant acted with actual malice, both in respect of appellee's imprisonment and in respect of the slanderous statements of its representatives. Concededly, under the local rule, the existence of malice in fact in a case like this warrants the imposition of punitive damages.

Apart from the mere size of the verdict, the claim of passion and prejudice is predicated on questions put to several of appellant's witnesses in the course of cross examination. These questions consist mainly of inquiries whether the witness under interrogation had or had not made a certain statement tending to impeach his testimony.[1] In each instance the witness denied having made the state-

[1]In one instance it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time.

ment. The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury. The cause was submitted to them under elaborate instructions carefully defining the applicable law in terms as favorable to appellant as it could reasonably have asked. There were no objections to the charge on appellant's part.

The power of this court in respect of verdicts claimed to be excessive is not coextensive with that of the district court. At most we may consider only whether the verdict is grossly excessive or "monstrous." Southern Pacific Company v. Guthrie, 9 Cir., 186 F. 2d 926, 931-33. When the trial judge is presented, as the judge was here, with a motion for a new trial grounded on a claim of excessive verdict, his power to deal with such a claim is not limited as ours is to questions of law. He may set aside a verdict when he thinks it is against the weight of the evidence or for other reasons he deems sufficient. In this instance the judge, familiar with the atmosphere of the trial and sensible of imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive. On the record before us, certainly we can not say that he was wrong.

Counsel argue that the court prejudiced their case by criticizing a hypothetical question propounded to medical

witnesses whose opinion was sought as to whether appellee had practiced medicine in accordance with standards obtaining in Idaho. The hypothetical inquiry was unusually lengthy. The court in the presence of the jury expressed the belief that it included a number of matters that could be of no aid to the witnesses in forming an opinion. Counsel now say that the court's remarks "not only destroyed the value of the expert medical testimony given in response to the hypothetical question, but also discredited the supporting testimony which practically constituted appellant's entire defense." Yet counsel made no such suggestion at the time or indeed at any time while the case was before the district court. They did not ask that a mistrial be declared, nor did they subsequently advance the remarks of the court as a ground for granting their motion for a new trial. We have nevertheless studied the hypothetical question and considered the judge's comments concerning it. The comments, we think, were not unwarranted. The question propounded appears argumentative, and it included, as the court observed, a number of matters that could not conceivably be of aid to a medical man in forming an opinion on the subject inquired about. Moreover the judge instructed the jury to disregard his remarks.

One other point will be noticed briefly. Appellant is a California corporation doing business in Idaho, and its co-defendant, Bradley, is a resident of California. The complaint alleged and the answer denied that plaintiff is a citizen and resident of Idaho. It is argued that no proof whatever was offered as to his being a citizen of that state or any other state, hence the requisite diversity was not shown.

There was no proof directed immediately to the issue, but we think it sufficiently appears from the record as a whole that appellee was domiciled either in Idaho or in Texas.[2] The evidence is that he was raised in the latter state and after schooling was admitted to practice medicine there. During the second world war he entered the armed services and was discharged in October 1946, after which he sought a location in the northwest. In January of 1947 he entered into a contract of indefinite duration with appellant to take charge of the latter's hospital at Stibnite, Idaho. Following the making of this arrangement he returned to Texas to get his wife and children and to await the effective date of his employment, which was to be March 1, 1947. At that time he removed to Stibnite with his family and possessions, and resided there until May 15, 1948, when his contract was terminated by the company. At the inception of this employment he had applied for a license to practice medicine in Idaho and later was licensed by the state as a physician and surgeon. It casually appears from various items of evidence in the record that following his discharge at Stibnite he resided in Boise, where he was living at the time this case was filed and thereafter. Proof of residency in a state is usually thought prima facie evidence of domicile sufficient to shift the burden of proof. Cf. Kelleam v. Maryland Casualty Co., 112 F. 2d 940; Sherman v. Roosevelt Co., 48 F. Supp. 434; Tudor v. Leslie, 35 F. Supp. 969.

Affirmed.

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[2]The whole record may be looked to on this subject. Sun Printing & Publishing Assn. v. Edwards, 194 U. S. 377. There was enough proof, we think, to satisfy the jurisdictional requirement.

POPE, C. J., dissenting.

The circumstances which gave rise to this action took place in connection with the termination of the employment of the appellee, a physician and surgeon, who had been employed by the Bradley Mining Company. The Mining Company operated mines at Stibnite, a remote mining town located in the mountains of Idaho. It had a contract with its employees under which it arranged to provide hospital and medical care not only in cases arising out of industrial accidents, but in all cases of illness of the employees or any members of their families. To accomplish this it had established and equipped a hospital, and Dr. Boice, the appellee, had been employed to manage the hospital and to provide the medical and surgical care required. The appellee was the only physician in the community.

The work in the hospital was handled by a number of nurses, selected by the doctor, but paid by the Mining Company, and there were generally at least two who were graduate registered nurses. Dr. Boice and his family were furnished an apartment which was directly connected with the hospital.

At the time of the trial all of the graduate registered nurses, who had been employed in the hospital during Dr. Boice's management, testified. At that time none of them was any longer employed by or connected with the hospital or the Mining Company. Their testimony was all to the effect that it was exceedingly difficult to get the doctor to see patients who came to the hospital for advice or treatment; that on many occasions he refused to see or interview such patients; that on occasions employees injured in serious industrial accidents were brought to the hospital and